

No. 43332-0-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

**STATE OF WASHINGTON,
Respondent,**

v.

**DUANE M. RADER,
Appellant.**

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
I. INTRODUCTION/SUMMARY OF THE ARGUMENT.....	1
II. ASSIGNMENT OF ERROR.....	2
A. Assignment of Error.....	2
1. The trial court erred in admitting Ria Rader's prior acts testimony as part of a common scheme or plan.....	2
2. The trial court erred in admitting Ria Rader's prior acts testimony to prove elements of the charged crimes.....	2
3. The trial court erred in holding the probative value of Ria Rader's testimony outweighed the risk of unfair prejudice.	2
4. The trial court erred in admitting expert testimony regarding "the general dynamics of domestic violence."...	2
5. The trial court erred in abrogating the patient-physician privilege to admit statements Mr. Rader made to a treating physician's assistant (PA).....	3
6. The trial court erred in imposing an exceptional sentence for the arson conviction when the evidence was insufficient as a matter of law to support the special verdict.	3
7. The trial court erred in imposing an exceptional sentence for the unlawful imprisonment conviction when the evidence was insufficient as a matter of law to support the special verdict.	
B. Issues Pertaining to Assignment of Error.....	3
1. Did the trial court erroneously determine that allegations Mr. Rader pushed, restrained and threatened Ria Rader established a common scheme or plan with the way he allegedly treated Heather, such that evidence of a common plan could be used to prove he pushed, restrained and threatened Heather in the charged crimes and that Ria's testimony was not more prejudicial than probative?.....	3

2.	Did the trial court abuse its discretion in admitting, over Mr. Rader’s relevance objection, expert testimony on “the general dynamics of domestic violence,” when much of the evidence admitted under this ruling had to do with the nature and behavior of perpetrators and the symptoms of post traumatic stress disorder, matters not relevant to proving the charged crimes?	3
3.	Did the trial court err in holding the patient-physician privilege was abrogated when no facts took this case out of the mine run of criminal cases in which the privilege applies and the court failed to balance the privilege’s purpose of facilitating full disclosure in medical treatment against the need for full disclosure at trial?	4
4.	If none of the individual evidentiary errors requires reversal, did they cumulatively prejudice Mr. Rader and deprive him of his right to a fair trial?	4
5.	Should Mr. Rader’s sentence be vacated and remanded when the State failed to prove the aggravating circumstance that the arson and unlawful imprisonment were committed within the sight or sound of the victim’s minor daughter when the crimes were committed in the downstairs kitchen while the daughter was upstairs in her bedroom?	4
III.	STATEMENT OF THE CASE.	4
A.	Procedural History.	4
B.	Substantive Facts.	6
1.	Evidentiary Rulings.	6
a.	Testimony of Ria Rader.	6
b.	Expert Testimony on Domestic Violence.	11
c.	Denial of the Patient-Physician Privilege.	11
2.	Evidence of the Charged Crimes.	12
3.	Sentencing.	22
IV.	ARGUMENT.	22

POINT I:	The Trial Court Erred in Holding Ria's Prior Acts Testimony Was Admissible Evidence of a Common Scheme or Plan.	22
A.	The Trial Court Misinterpreted the Meaning of Common Scheme or Plan or, Alternatively, Abused its Discretion in Finding Such a Plan.	24
a.	Mr. Rader Did Not Devise a Plan and Use it To Commit Domestic Violence Against Two Women.	24
b.	Significant Similarities Did Not Exist Between the Prior and Charged Acts.....	28
B.	Even if a Common Scheme or Plan Existed, It Was Not Relevant to Proving Elements of the Charged Crimes.	33
C.	The Probative Value of Ria Rader's Testimony Did Not Outweigh the Risk of Unfair Prejudice.	35
D.	The Error Was Not Harmless.....	36
POINT II:	The Trial Court Abused Its Discretion in Admitting Expert Testimony on "The General Dynamics of Domestic Violence," Over the Defendant's Relevance Objection, When Much of the Evidence Admitted under this Broad Ruling Was Irrelevant..	38
POINT III:	The Trial Court Erred in Admitting the Statements Mr. Rader Made to a Treating Physician's Assistant, Prejudicing Mr. Rader and Requiring Reversal of the Arson Conviction.....	42
POINT IV:	If None of the Errors Individually Requires Reversal, this Court Should Reverse for Cumulative Error.	49
POINT V:	The State Failed to Prove Either the Arson or the Unlawful Imprisonment "Occurred Within Sight or Sound of the Victim's . . . Minor Children".	50
V.	CONCLUSION.	54
	CERTIFICATE OF SERVICE.	55

TABLE OF AUTHORITIES

Cases

Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994).	43
Cook v. King, 9 Wn. App. 50, 510 P.2d 659 (1973).	48
Department of Social and Health Services v. Latta, 92 Wn.2d 812, 601 P.2d 520 (1979).	48
In re Detention of Coe, No. 85965–5, 2012 WL 4458411 (September 27, 2012).	49
State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000).	34
State v. Boehme, 71 Wn.2d 621, 430 P.2d 527 (1967).	43, 45
State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997).	41
State v. Brewton, 49 Wn. App. 589, 744 P.2d 646 (1987)	48
State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988).	39
State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996).	38
State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).	22-27, 29, 32, 33, 42
State v. Fuller, ___ Wn. App. ___, 282 P.3d 126 (2012).	23, 34
State v. Gibson, 3 Wn. App. 596, 476 P.2d 727 (1970).	43, 47
State v. Godsey, 131 Wn. App. 278, 127 P.3d 11 (2006).	47
State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000).	49
State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012).	23-25, 27-29
State v. Grier, 168 Wn. App. 635, 278 P.3d 225 (2012).	38
State v. Harris, 51 Wn. App. 807, 755 P.2d 825 (1988).	48

State ex rel. Haugland v. Smythe, 25 Wn.2d 161, 169 P.2d 706 (1946).....	48
State v. Hosier, 157 Wn.2d 1, 133 P.3d 936 (2006).	50, 51
State v. Kennealy, 151 Wn. App. 861, 214 P.3d 200 (2009).....	26, 27, 32
State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996).....	32
State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995)..	24-25, 27-29
State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001).....	37
State v. Nysta, 168 Wn. App. 30, 275 P.3d 1162 (2012)	53
State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995).	22
State v. Ross, 89 Wn. App. 302, 947 P.2d 1290 (1997).	45
State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	50, 51
State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982).	34
State v. Sexsmith, 138 Wn. App. 497, 157 P.3d 901 (2007).....	32, 35
State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986).....	23, 36
State v. Smith, 84 Wn. App. 813, 929 P.2d 1191 (1997).	44-47
State v. Stanton, 68 Wn. App. 855, 845 P.2d 1365 (1993).	36
State v. Thach, 126 Wn. App. 297, 106 P.3d 782 (2005).	37
State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1999).....	35
State v. Wilson, 144 Wn. App. 166, 181 P.3d 887 (2008).	23, 36-37
United States v. Winters, 729 F.2d 602 (9th Cir. 1984).	39

State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009)..... 50

State v. Zigan, 166 Wn. App. 597, 270 P.3d 625 (2012)..... 50

Statutes

RCW 5.60.060..... 42, 43, 47, 48

RCW 9.94A.535(2)(h)(ii). 51, 53

RCW 9.94A.537(3). 50

RCW 9A.40.040. 51

RCW 9A.44.040 26

RCW 9A.44.050 26

RCW 9A.44.060. 26

RCW 9A.46.020. 26

RCW 9A.48.020(1). 52

RCW 9A.56.190. 26

RCW 10.58.010..... 43

RCW 10.58.090..... 33

Court Rules

ER 402..... 38

ER 403..... 35

ER 404(b)..... 23, 24

ER 702..... 38

I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Duane M. Rader, was charged with offenses involving domestic violence, including attempted murder, arson, felony harassment, unlawful imprisonment, witness tampering and two counts of fourth degree assault, all allegedly involving his wife, Heather Rader. A jury acquitted him of attempted murder, witness tampering, and one count of assault.

Over Mr. Rader's objection at trial, the superior court made three evidentiary errors. It admitted:

1) the prior bad acts testimony of Mr. Rader's ex-wife, Ria Rader, who also claimed to be the victim of Mr. Rader's domestic abuse, as part of a common scheme or plan to prove specific actions Mr. Rader allegedly took against Heather Rader (threats, assaults, restraint of movement);¹

2) expert testimony on "the general dynamics of domestic violence" which resulted in the State introducing much irrelevant and prejudicial evidence as to the nature and behavior of perpetrators and the symptoms of post traumatic stress disorder (PTSD) suffered by some victims (the expert had never spoken to Ria, Heather, or Duane Rader); and

1. To avoid confusion in this brief, Ria Rader is sometimes referred to as Ria and Heather Rader is sometimes referred to as Heather. No disrespect is intended.

3) statements the court held subject to the patient-physician privilege but admitted, holding the interest of full disclosure to the jury abrogated the privilege.

Mr. Rader argues these errors, which allowed the State to portray him as an inveterate wife abuser before the alleged victim ever took the stand, both individually and cumulatively prejudiced him and violated his right to a fair trial. In addition, he argues the jury's special verdicts that the arson and unlawful imprisonment convictions were committed within the sight or sound of the victim's minor child were not supported by the evidence and, thus, his exceptional sentence was erroneously imposed.

ASSIGNMENT OF ERROR

A. Assignment of Error

1. The trial court erred in admitting Ria Rader's prior acts testimony as part of a common scheme or plan.

2. The trial court erred in admitting Ria Rader's prior acts testimony to prove elements of the charged crimes.

3. The trial court erred in holding the probative value of Ria Rader's testimony outweighed the risk of unfair prejudice.

4. The trial court erred in admitting expert testimony regarding "the general dynamics of domestic violence."

5. The trial court erred in abrogating the patient-physician privilege to admit statements Mr. Rader made to a treating physician's assistant (PA).

6. The trial court erred in imposing an exceptional sentence for the arson conviction when the evidence was insufficient as a matter of law to support the special verdict.

7. The trial court erred in imposing an exceptional sentence for the unlawful imprisonment conviction when the evidence was insufficient as a matter of law to support the special verdict.

B. Issues Pertaining to Assignment of Error

1. Did the trial court erroneously determine that allegations Mr. Rader pushed, restrained and threatened Ria Rader established a common scheme or plan with the way he allegedly treated Heather, such that evidence of a common plan could be used to prove he pushed, restrained and threatened Heather in the charged crimes and that Ria's testimony was not more prejudicial than probative?

2. Did the trial court abuse its discretion in admitting, over Mr. Rader's relevance objection, expert testimony on "the general dynamics of domestic violence," when much of the evidence admitted under this ruling had to do with the nature and behavior of perpetrators and the symptoms of post traumatic stress disorder, matters not relevant to proving the charged crimes?

3. Did the trial court err in holding the patient-physician privilege was abrogated when no facts took this case out of the mine run of criminal cases in which the privilege applies and the court failed to balance the privilege's purpose of facilitating full disclosure in medical treatment against the need for full disclosure at trial?

4. If none of the individual evidentiary errors requires reversal, did they cumulatively prejudice Mr. Rader and deprive him of his right to a fair trial?

5. Should Mr. Rader's sentence be vacated and remanded when the State failed to prove the aggravating circumstance that the arson and unlawful imprisonment were committed within the sight or sound of the victim's minor daughter when the crimes were committed in the downstairs kitchen while the daughter was upstairs in her bedroom?

III. STATEMENT OF THE CASE

A. Procedural History

On August 11, 2011, the State charged Mr. Rader with the following five crimes: Attempted Murder in the Second Degree/Domestic Violence; Arson in the First Degree/Domestic Violence; Felony Harrasment/Domestic Violence; Tampering with a Witness/Domestic Violence; Assault in the Fourth Degree/Domestic Violence. Counts I, II, III and V were alleged to have been

committed on February 13, 2011; Count IV was alleged to have occurred on or between February 13 and February 19, 2011. Clerk's Papers on Appeal (CP) 4-5.

The State filed an amended information on August 23, 2011, adding allegations of child enhancements to Counts I through III; adding a new Count IV, Unlawful Imprisonment with Child Enhancement/Domestic Violence, allegedly occurring February 13, 2011; adding a second charge of Assault in the Fourth Degree/Domestic Violence, allegedly occurring on or between April 1 and April 30, 2011 (Count VII); and adding three charges of Violation of Pretrial No Contact Order/Domestic Violence (Counts VIII through X). CP 6-8. A second amended information was filed to correct the dates of the alleged crimes in Counts VIII through X to August 18, 2011. CP 9-11.

On February 29, 2012, Mr. Rader pleaded guilty to Counts VIII through X, the No Contact Order/Domestic Violence counts. CP 6-8; CP 17-22; Verbatim Report of Proceedings (VRP) 136-40. Following a six-day jury trial, the jury acquitted Mr. Rader of attempted murder, witness tampering, and fourth degree assault as charged in Count VII. CP 73, 82 & 85; VRP 618 & 620. It convicted him of the other charges. CP 74, 77, 79, & 83; VRP 618-20. The jury further found Mr. Rader and the victim to have been members of the same family or

household. CP 76, 78, 84, & 86. It also found the arson and unlawful imprisonment were committed in the presence of a child. CP 75 & 81.

At sentencing, held on March 27, 2012, the parties agreed on Mr. Rader's offender score, the crimes' seriousness levels, and the sentencing ranges. VRP 640. The court imposed an exceptional sentence of 120 months on Count II (first degree arson), 22 months on Count III (felony harassment); an exceptional sentence of 60 months on Count IV (unlawful imprisonment); and 364 days on each of the gross misdemeanors (Counts VI, VIII, IX & X). CP 113; VRP 650-52. The court further imposed 18 months of community custody on Count II, CP 120, and 12 months on Count III, CP 114, VRP 652-53; and lifetime no contact orders with the victim or her minor daughter. VRP 652; CP 105-08.

Notice of appeal was timely filed. CP 121-32.

B. Substantive Facts

1. Evidentiary Rulings

a. Testimony of Ria Rader

Prior to trial, the State moved to admit prior acts testimony of Heather Rader and Ria Rader. CP 147-56. On appeal, Mr. Rader does not challenge the admission of Heather Rader's prior acts testimony.

The State sought to introduce the testimony of Mr. Rader's ex-wife, Ria Rader, who had never met Heather Rader, as evidence of a common scheme or plan and to establish elements of the charged crimes. CP 153-55. At the hearing, the State argued Ria's prior acts testimony helped prove Heather fear and reasonable belief the threat would be carried out in the felony harassment charge, her being restrained without legal authority in the unlawful imprisonment charge, her being prevented from telling people about the threats in the witness tampering charge, and the assaults. VRP 74-75. Mr. Rader argued Ria's testimony did not establish a common scheme or plan because the incidents described by both women were not similar. CP 15. He also argued the events showed mere propensity – that Mr. Rader beats women – not a common scheme or plan. VRP 70-71.

The trial court found the prior acts were established by a preponderance of the evidence. VRP 91-92. It also found a common scheme or plan existed, finding the prior acts and the charged acts “similar enough here that I am finding that it is appropriate that such prior evidence of domestic violence be admitted regarding the threats, the type of pushing conduct, the timing for when this type of conduct allegedly occurred.” VRP 91. In addition, the court held the State established the prior acts proved elements of some of the charged crimes: the victim's reasonable

fear and the threat to kill in the felony harassment charge, physical force and interference with liberty in the unlawful imprisonment charge, the assault elements of the assault charges, and elements of the witness tampering charge. VRP 93-94, CP 27. Finally, the court found the probative value of the prior acts outweighed the prejudicial effect of the evidence. VRP 92-93.

At the hearing, Ria Rader stated she met Mr. Rader in July 2002 and they had a good dating relationship. VRP 17. About a month after she and Mr. Rader were married in March 2003, Mr. Rader threw a picture that hit the wall and shattered glass on her. VRP 17-18. Ria was not injured. VRP 27. That evening when she tried to pack her things and leave, he threw the door of their closet at her and told her she was not going anywhere. VRP 18, 28. Her husband told her she could not leave three times during their seven-year marriage. VRP 36.

Mr. Rader punched Ria in the arm in the summer of 2003, leaving a very large bruise. About a year later, he threw a beer bottle at her head, it missed and hit a picture window. He threw a plate at the wall earlier that day. VRP 19. On numerous occasions he would push her when he was angry; one time he threw her into his car when she was trying to leave and left bruises on her arms. Another time, when she was not ready to leave a friend's house, he pushed her in the head and she hit the pavement. VRP 20. Twice he grabbed her by her hair and her head

hit the pavement, once in 2008 when she was outside talking to a neighbor. VRP 20-21. Ria never reported the incidents because she had been afraid since the first incident after their marriage. VRP 24.

Mr. Rader threatened that if Ria left he would kill her and also said he would kill her kids in front of her. He made no other threats, but told her how stupid she or her children were and how she was not good enough. VRP 21. He also said women were evil, useless and worthless. VRP 24. He made demeaning comments at least once or twice a week during the latter half of their marriage. VRP 32-33. Although Mr. Rader owned guns, he never threatened to shoot Ria, only to shoot himself. VRP 23. In addition, he smoked and used a Zippo refillable lighter, keeping the kept lighter fluid in a kitchen drawer. VRP 22.

They were divorced in April 2010. VRP 24. Ria never met Heather Rader. VRP 34.

Heather met Mr. Rader online in January 2010. They met in person August 18 of the same year, moved in together and continued dating. The two were married on January 3, 2011. VRP 38-39.

Before their official marriage, the couple had two significant, explosive arguments, although there was no physical violence. The first occurred on Thanksgiving Day 2010, when Mr. Rader began screaming at Heather, telling her

she was worthless, he deserved better, and he was going to leave her. The second was a similar fight in December during which Mr. Rader called the police because he was afraid of what he might do. VRP 40-41.

After the marriage, Mr. Rader began dictating to Heather, telling her what she could wear, with whom she could associate, and demanding her constant availability. VRP 42. Beginning a couple days after the marriage, Mr. Rader pushed Ms. Rader about eight times over the course of a month when she tried to leave the house to escape his anger. VRP 42-43. In early February 2011, when Heather was trying to leave, Mr. Rader pushed her and her head hit the door. VRP 43-44. Beginning about mid-January, and occurring every few days or once to twice a week, Mr. Rader threatened to hurt her, her family, or her daughter if she left him. VRP 44, 48-49. Also starting in January, he would tell Ms. Rader in arguments he had easy access to guns since he worked at the army base, statement she understood as threats. VRP 45-46. In January or February, he called the police again from fear that he would hurt her. VRP 46-47.

Mr. Rader would apologize and beg Heather not to leave. VRP 47. He also told her he would not let her leave, that she was not allowed, that he would not give her the car keys. VRP 48. He told her it would hurt his career if she reported his actions and also threatened her. VRP 50.

b. Expert Testimony on Domestic Violence

The State also moved to admit the expert testimony of Peg Cain “regarding the dynamics of domestic violence” and to explain “seemingly inconsistent conduct on the part of the victims.” CP 135. Mr. Rader objected, arguing the statements had little probative value since the expert never spoke to Heather and, thus, the testimony would be irrelevant and nothing but generalizations based on the State’s hypothetical questions. CP 16; VRP 82. The trial court ruled the expert could testify regarding “the general dynamics of domestic violence” because Heather Rader did not immediately report the incidents resulting in the charged crimes. CP 29; VRP 87-88.

c. Denial of the Patient-Physician Privilege

Mr. Rader moved to exclude his statements to Rebecca Bean, a physicians’s assistant (PA) at Joint Base Lewis-McChord who treated Mr. Rader for burns on his foot. CP 13-14. The State objected, arguing there was no privilege and if there were, the public interest in allowing the jury to hear the evidence outweighed the concerns underlying this merely statutory privilege. CP 159-63.

The trial court implicitly found the communication was privileged. VRP 131-33. However, it held “[d]octor-patient privilege has been overcome and

broken in this case.” CP 30. The court held the privilege had been abrogated after balancing the embarrassment to Mr. Rader of the disclosure against the “jury’s right to receive full information and make their own judgment.” VRP 133; CP 30.

2. Evidence of the Charged Crimes

Ria Rader was married for seven years to Mr. Rader. VRP 339. She never met Heather Rader. VRP 351.

Ria and Mr. Rader met at a bar near where each worked in 2002 and had a great relationship until they were married in March 2003. VRP 340, 345. About a month after the marriage, they had an argument in which Mr. Rader threw things at her. VRP 340. Ria never told anyone about the incident and was not injured. VRP 341, 352. A few months after the marriage, Mr. Rader punched her in the arm, leaving a large bruise. VRP 344. The couple had another fight in 2004, when Mr. Rader threw a plate which shattered on the wall and landed at her feet. VRP 341. Not long after, Mr. Rader threw a beer bottle at her while she was sitting under a picture window. VRP 341. Ria was not hurt in either incident. VRP 354.

The couple had another argument in 2005. When Ria tried to leave, as she was walking down the road, Mr. Rader grabbed her by the arms and threw her in his car. VRP 343. She had bruises on her upper arms where he grabbed her. VRP

344. In 2008, Mr. Rader grabbed Ria by the hair and slammed her head to the pavement while she was outside talking to a neighbor. VRP 342.

Physical incidents occurred between Ria and Mr. Rader at least one or two times a month during their marriage. Ria never reported any of the incidents because Mr. Rader had previously threatened to kill her and her children. VRP 346-47. He did not often threaten her. In their seven years of marriage, it happened only a few times. VRP 347-48. When Ria knew Mr. Rader, he used a Zippo refillable lighter and kept the lighter fluid in a kitchen drawer. VRP 348.

During the marriage, Mr. Rader was very verbally abusive; he would yell at her and tell her things like she is not good enough, she is a horrible person, her kids are terrible. VRP 349-50. He also told her “women are evil and worthless and useless.” VRP 357. In addition, Mr. Rader tried to restrict her movements during the marriage. VRP 350-51. Every time Ria tried to leave, Mr. Rader would block her from leaving and talk her into staying by saying he was sorry and he loved her. VRP 347. The two were divorced in April 2010. VRP 345.

Peg Cain, an owner/therapist/educator at a domestic violence treatment agency, VRP 362-64, testified regarding the general dynamics of domestic violence. CP 29. Cain never met Ria or Heather Rader. VRP 378.

Accordingly to Cain, in domestic violence situations, there is a period of building up to an incident that explodes, a drop in intensity, and then a calm period before the cycle begins again. Over time, the intensity of the violence usually increases and time between explosions shortens. VRP 369. Different kinds of abuse exist in parallel with physical abuse: verbal, psychological, emotional, social, financial and sexual. VRP 369-70.

Perpetrators come from all demographics. “They look like you and me.” VRP 370. Domestic violence is a learned behavior which sometimes becomes a coping skill around issues of power and control. VRP 368. Perpetrators usually have issues around their own feelings of powerlessness originating in abusive childhoods. They believe if they have more power they will feel better. *Id.* Thus, perpetrators control such details as where their partners go and with whom they associate. VRP 371. Perpetrators are filled with “lots of denial” and usually engage in “lots of blaming” their behavior on their partners. VRP 371. Perpetrators usually have a need to isolate their partners, starting with reducing contact with friends and outside activities and eventually isolating the partner from family members. VRP 370-71.

Victims may have symptoms of post traumatic stress disorder, which may manifest as a heightened alertness to their safety, constant surveillance, and a fear

of causing a problem. VRP 374-75. Cain found “really interesting,” in working with victims who have left abusive relationships, that “one of the times they feel safe is when they know [the perpetrator] is in jail, because they spend a lot of time looking over their shoulders.” VRP 374.

One of the primary misconceptions about domestic violence is that if physical abuse were happening, the abused partner would just leave. VRP 372. Victims stay with an abusive partner for many reasons, including family pressure, fear of losing their children, religious beliefs, and financial dependency. VRP 373. The victim’s self-esteem may cause them to stay, as may a fear of increased aggression if they try to leave. VRP 374. In addition, learned helplessness, caused by many years of verbal degradation, can inhibit a victim’s actions. VRP 376-77. In Cain’s experience, a woman leaves an abuser seven times before staying away. Some manage to make the break the first time, for others it may take 14 times, “if they’re not dead.” VRP 385.

Victims may fail to report the abuse because of their relationship with the perpetrator and the existence of children. VRP 373. In addition, they may not report the abuse out of embarrassment, fear of not being believed, a lack of support, a fear of being blamed for what happened. VRP 375-76. It is very common for victims not to cooperate with law enforcement, very common to

recant after initially reporting an incident. The victims often do not want the perpetrator to go to jail. VRP 375. It would also be common for a victim to initially withhold reporting the abuse and later report it once they either finally feel safe or become even more afraid for their safety. VRP 376. It would also be common for victims to tell different stories about how an injury occurred, depending on their current emotional condition. VRP 377.

Heather Rader testified she met Mr. Rader online in January 2010. VRP 409-10. They had an Internet relationship until they met in person on August 18, 2010, and began dating. They had a good relationship and moved in together almost right away. VRP 410. Mr. Rader asked Heather to marry him in October 2010; they had a small unofficial ceremony the day after Thanksgiving 2010, which became official on January 3, 2011. VRP 411. Heather stated the relationship was “pretty good” until the marriage became official, but also described a “big” argument occurring in December 2010. VRP 412. That argument, which was threatening but not physical, escalated to the point Mr. Rader called the police because he was afraid of what he might do. VRP 412-13.

Their relationship changed after marriage. Mr. Rader became more controlling about things Ms. Rader could do and people she could speak to, he did not want her to wear skirts much above the knee. VRP 413. He also was

controlling about whom Heather could associate with and would not let her use the car if he did not want her to leave. In the middle or end of January, when she wanted to leave, Mr. Rader pushed her down to prevent it. VRP 414. Around the beginning of February, Mr. Rader pushed the back of Ms. Rader's head and hit it on the door when she tried to leave after an argument. VRP 415-16. He pushed Heather about eight times over the course of about a month. VRP 416.

Heather never told anyone else what was going on because she was scared Mr. Rader would hurt her or her eleven-year-old daughter, who lived with them. VRP 416-18. He told her if she left him or told anyone what was happening, he could hurt her and her daughter and that even if he could not do it himself, he knew other people who could. VRP 416. His threats started toward the middle of January 2011 and lasted until she left in May 2011. VRP 417.

On February 13, 2011, Mr. and Ms. Rader were both downstairs in the living room of their house. When Mr. Rader poured himself a drink, Heather asked him not to drink and he got very angry. Heather decided to go upstairs to bed. VRP 421. About an hour later, she woke up when Mr. Rader slammed the bedroom door open. VRP 425. He told her she was evil and he had a bullet he was going to put it in her head. VRP 426. She believed him. Heather decided to leave and went downstairs also. VRP 427.

Heather went to get her purse from the kitchen, telling Mr. Rader she was leaving. VRP 428-29. He grabbed her by the back of the hair, hit her head on the kitchen counter, and partly threw her/she partly fell to the floor, bruising her forehead. Her daughter was upstairs, “kind of awake” in her room when this happened. VRP 429-30, 432-33. As Ms. Rader lay on the ground, paralyzed with fear, Mr. Rader told her she was evil and had to die, squirted lighter fluid on her legs and tossed a lit match on her. VRP 433-36. When her legs caught fire, she began screaming, ran to the couch and wrapped her legs in the blanket, extinguishing the fire. VRP 436-37. She saw she had set the couch on fire, so she put the fire out and ran upstairs to soak in cold water in the bathtub. VRP 437.

Ms. Rader first saw daughter after the cold water soak, on her way downstairs to call 911. Her daughter, crying and terrified, stuck her head out her bedroom door to ask what happened. Ms. Rader told her to stay in her room. She went and got her daughter while on the 911 call and told her she was coming with her. VRP 463. Due to Mr. Rader’s threats, Heather did not tell the 911 operator the truth about what had happened. However, she persisted with the call because her legs were badly burned and she needed to go to the hospital. VRP 438-39. When the fire fighters and emergency medical technicians arrived, she told them the same story she told the 911 operator, which was that her legs caught fire when

she spilled lighter fluid on them while filling a Zippo lighter. VRP 439-40; see VRP 161-62.

Ms. Rader and her daughter were taken to Madigan Army Medical Center. VRP 441; VRP 176-77. The treating physician diagnosed second-degree burns, also called partial thickness burns, on the back side of the right leg and the shin side of the left leg. VRP 177. Ms. Rader told him she was burned when she dropped her lighter while filling it with butane and it erupted at her feet. VRP 180.

Once home, Ms. Rader received ongoing care for her burns, telling the treating nurse the story about being burned with spilled the lighter fluid. VRP 183-85. The nurse explained second degree burns are “excruciatingly painful.” VRP 194. Ms. Rader could not walk on her own for about a month after the incident, was nauseous, tired, severely dehydrated, and in pain all the time. VRP 445. The pain remained fairly severe for close to a month and, at the time of trial, she still had pain almost all the time. VRP 446.

Responding to the 911 call, Deputy Sheriff Tyson Beall knocked on the door of the Rader house, yelling for Mr. Rader to come to the door to talk. VRP 211. After more than a minute, he heard a “come in” and went inside. VRP 211-12. Mr. Rader was sprawled on the stairs, nonresponsive to questions and apparently under the influence of alcohol. VRP 212, 214. Mr. Rader told Beall

Heather had hit him all over. Beall did not see any redness or injuries consistent with being struck. VRP 216. Beall went outside to speak with Heather, who denied a physical confrontation. VRP 217.

When Beall returned to the house, the door was locked and the lights were off. He rang and beat on the door but got no answer. VRP 218, 242, 244.

Returning to his patrol car, he learned Mr. Rader had called 911. He then went back to the house and was let in. VRP 244. Mr. Rader said he was smoking by the back door and the couch caught fire. VRP 220, 245. The couch was burned and melted and an ottoman was fire-damaged. VRP 215, 221.

Mr. Rader was examined by Rebecca Bean, an army physician's assistant at Joint Base Lewis McChord. VRP 256, 258. Bean is the primary care provider for the unit to which Mr. Rader was assigned. VRP 256. It is her duty to care for the soldiers who report to sick call each morning. VRP 257. On the morning of February 16, 2011, Mr. Rader contacted her with his injuries. VRP 258. He had burns on his hand and feet. VRP 258-60. Bean treated the burns and ordered him to wear a post-op shoe until the skin healed. VRP 260-61. Bean could not remember what Mr. Rader told her about how fire started, other than the fact that he was drunk when it happened. VRP 262, 263. However, her notes reflected Mr. Rader's statement that he had started the fire while drunk. VRP 262.

When questioned about the incident, Mr. Rader told a supervising officer the fire started after a night he and his wife had spent drinking. VRP 274, 279. Heather spilled some lighter fluid and when Mr. Rader lit a cigarette, she was caught on fire. VRP 275. When Hernandez told Mr. Rader he did not believe his story, Mr. Rader merely shrugged without comment. VRP 278.

Heather remained in the hospital about five days. VRP 444. Mr. Rader visited her there, where he repeated his threats of hurting her and her daughter if she told the truth. VRP 442. After leaving the hospital, she returned to live with her husband because she was afraid he would hurt her daughter. VRP 446-47. During this period, Mr. Rader threatened her every day, saying, on one occasion, how easy it would be for him to bring guns home from work since he was in the military. She believed he was saying he could kill her if he wanted to. VRP 449.

Ms. Rader moved out in May to take care of her grandmother. VRP 451. In August, she decided to tell the real story because she and her daughter were safe. VRP 451. Ms. Rader called the Thurston County police to change her statement. VRP 452, VRP 330-31. Mr. Rader was arrested. VRP 452.

Mr. Rader called Heather from jail. Testimony established he made ten attempts from the jail to Ms. Rader's phone number. Three calls were completed on August 18, 2011, between 12:55 p.m. and 5:30 p.m. VRP 293, 295. In one of

the calls, a portion of which was played for the jury, VRP 456-57, Mr. Rader said, “It happened. Just like my DUI happened, and it ruined my life.” *See* VRP 568.

3. Sentencing

Mr. Rader’s standard sentencing range for the arson conviction was 46 to 61 months, the range for the unlawful imprisonment conviction was 17 to 22 months. VRP 647. The court imposed exceptional sentences of 120 months for the arson and 60 months for the unlawful imprisonment. VRP 650. The sole basis for the exceptional sentences was the jury’s finding that the crimes had been committed within the sight or sound of Heather Rader’s daughter. VRP 648-50.

IV. ARGUMENT

POINT I: The Trial Court Erred in Holding Ria’s Prior Acts Testimony Was Admissible Evidence of a Common Scheme or Plan

The trial court erred in admitting Ria Rader’s testimony about Mr. Rader’s alleged abuse of her. A court reviews the interpretation of an evidentiary rule *de novo*. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Once the rule is correctly interpreted, the trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.* Abuse of discretion exists “[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). In close cases, the balance must be tipped in favor of the defendant.

State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008), *citing*, State v. Smith, 106 Wn.2d 772, 767, 725 P.2d 951 (1986).²

Evidence of prior bad acts is presumed inadmissible under ER 404(b). DeVincentis, 150 Wn.2d 11, 17. “ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). As this Court recently observed:

Evidence of a defendant’s past crimes or bad acts is not admissible to show that the defendant likely committed the crime charged, that the defendant acted in conformity with prior bad acts, or that the defendant had a propensity to commit the crime.

State v. Fuller, ___ Wn. App. ___, 282 P.3d 126, 143 (2012), *citing*, ER 404(b).

The State must surmount “a substantial burden” before prior acts evidence is admitted. DeVincentis, 150 Wn.2d 11, 17.

In this case, the trial court erred in admitting Ria Rader’s testimony as proof of a common scheme or plan. The Supreme Court established a four-part test for the admission of such evidence:

The prior acts must be “(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan

2. Although the court admitted the prior acts testimony as proof only of some of the charged crimes, CP 27, it did not so limit the jury’s use in the limiting instruction given before Ria Rader testified. VRP 338. Thus, Mr. Rader challenges all his convictions on this ground.

or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.”

DeVincentis, 150 Wn.2d 11, 17, *citing*, State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995), *accord* Gresham, 173 Wn.2d 405, 421. Unless the ER 404(b) analysis is scrupulously applied by the trial court, mere propensity evidence may be admitted. *See* DeVincentis, 150 Wn.2d 11, 17, 18. Here, the trial court erred in its application of three of the four prongs of this test: a) the evidence was inadmissible to prove a common scheme or plan, b) it was not relevant to prove any elements of the crimes charged, and c) it was more prejudicial than probative.

A. The Trial Court Misinterpreted the Meaning of Common Scheme or Plan or, Alternatively, Abused its Discretion in Finding Such a Plan

a. Mr. Rader Did Not Devise a Plan and Use it To Commit Domestic Violence Against Two Women

First, the trial court erred in its interpretation of what constitutes a common scheme or plan. Two different types of common schemes or plans have been accepted. “One is where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan.” Lough, 125 Wn.2d at 855. Only the second type is at issue here: “The other situation arises when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.” Id.

The State failed to prove the second type of plan, that Mr. Rader devised a plan and used it repeatedly. Lough, 125 Wn.2d at 855. Such a plan is found when the defendant's scheme creates the opportunity to commit the crimes. In Lough, for example, the defendant created the opportunity to rape his prior and current victims by drugging them and rendering them unconscious. 125 Wn.2d at 850-51. The Court held the prior act evidence "evidences a larger design to use [the defendant's] special expertise with drugs to render [his victims] unable to refuse consent to sexual intercourse. A rational trier of fact could find that the Defendant was the mastermind of an overarching plan." Lough, 125 Wn.2d at 861.

Similarly, a defendant created an opportunity to fondle his child victims when, in two prior cases and the charged offense, the defendant took a trip with young girls and, at night, while the other adults were asleep, fondled the girls' genitals. Gresham, 173 Wn.2d 405, 422. The Court found the instances were "naturally to be explained as 'individual manifestations' of the same plan." *Id.*, quoting, Lough, 125 Wn.2d at 860.

In DeVincentis, the defendant's plan creating the opportunity for the crimes was in getting his victims used to seeing him nearly naked before initiating physical contact. There, the current victim testified that, prior to touching her, the defendant arranged opportunities to be alone with her over a period of weeks,

when he would wear only a g-string or a bikini. DeVincentis, 150 Wn.2d 11, 13-14. A prior child victim testified to being accustomed to spending three or four nights a week at the defendant's house when he would wear only a g-string or a bikini before he sought physical contact. 150 Wn.2d 11, 15. The Court held "the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative." *Id.* at 17-18.

As these cases show, a scheme or plan is established by facts showing similarity between how the defendant devised the opportunity to commit the prior acts and the charged crimes. *Accord State v. Kennealy*, 151 Wn. App. 861, 889, 214 P.3d 200 (2009) (agreeing "the common features here show a plan or design to gain access to children in order to repeatedly sexually abuse young children"). If it were primarily the shared elements of the crimes that were significant, most crimes of the same type would involve a common scheme or plan. After all, all robberies involve an unlawful taking, RCW 9A.56.190; all rapes involve sexual intercourse, RCW 9A.44.040, 9A.44.050, 9A.44.060; all harassment charges involve threats. RCW 9A.46.020.

For these reasons, the trial court in this case misunderstood the common scheme or plan test when it held that the common scheme or plan here was that Mr. Rader pushed and threatened Ria shortly after their marriage just as he was

alleged to have pushed and threatened Heather. VRP 91. In fact, for a common scheme or plan to be shown in this case in the same manner it was shown in Lough, Gresham, DeVincentis, and Kennealy, the court would have had to find Mr. Rader followed a common plan in creating the opportunity to assault, threaten and detain his two wives; in other words, that the way he met and married his alleged victims was the plan he devised to commit his crimes.

Significantly, Mr. Rader's two marriages did not follow a common pattern. Mr. Rader met Ria at a bar near where they both worked and they dated for about seven months until they were married. VRP 17, 340. By contrast, Mr. Rader met Heather online, while he was deployed. VRP 38. Mr. Rader and Heather had an online relationship for about eight months, after which they almost immediately moved in together. They were married about five months later. VRP 38-39.

Mr. Rader and Ria dated and had a good relationship from July 2002 until about a month after their marriage in March 2003. VRP 17. By contrast, Mr. Rader and Heather had two major arguments before their official marriage in January 2010. VRP 40-43. In addition, Mr. Rader began pushing Heather "just a couple days after" the marriage. VRP 43.

Thus, far from establishing Mr. Rader was "the mastermind of an overarching plan," Lough, 125 Wn.2d at 861, to meet and marry women so he

could abuse them, the evidence showed Mr. Rader met and married two different women under two quite different sets of circumstances. Indeed, far from devising and following a common scheme or plan to abuse the women, Mr. Rader was so concerned about his anger toward Heather that he called the police on himself twice before the incidents alleged in the information to prevent something from happening. VRP 41, 46-47. This is additional evidence there was no plan, just Mr. Rader's inability to control his anger. That his anger management deficiencies resulted in injury to two women and the destruction of two marriages proved nothing other than his propensity to violence toward a spouse. Without evidence Mr. Rader engineered the situations that made the prior acts and charged crimes possible, the State failed to prove a common scheme or plan.

b. Significant Similarities Did Not Exist Between the Prior and Charged Acts

If the plan need not be in creating the opportunity to commit the crimes, the trial court abused its discretion in holding sufficient similarities evidenced a common scheme or plan. A common design or plan is found only if "significant" similarities exist between the prior acts and the charged crime indicating "the conduct was directed by design." Lough, 125 Wn.2d at 860. While "the prior act and charged crime must be markedly and substantially similar, the commonality need not be 'a unique method of committing the crime.'" Gresham, 173 Wn.2d

405, 422, *quoting*, DeVincentis, 150 Wn.2d 11, 19-21 (noting Supreme Court “emphasize[d] that the degree of similarity for the admission of evidence of a common scheme or plan must be substantial”). Notably, a mere “similarity in results” is insufficient to prove a common scheme. Gresham, 173 Wn.2d 405, 422, *quoting*, Lough, 125 Wn.2d at 860.

The necessary marked and substantial similarity is lacking in this case. Ria had a good dating relationship with Mr. Rader. He first exhibited physical violence about a month after their marriage. VRP 17-18. By contrast, Heather and Mr. Rader had two significant arguments prior to their marriage. VRP 40-41. In addition, Mr. Rader first exhibited physical violence toward Heather “just a couple days after” the marriage. VRP 43.

Ria Rader testified to Mr. Rader throwing things at her. VRP 17-19. Heather Rader had no similar testimony. Although Mr. Rader owned guns, he never threatened to shoot Ria. VRP 23. By contrast, he repeatedly threatened Heather Rader with his access to guns. VRP 46.

Mr. Rader told Ria she could not leave three times during their seven-year marriage. VRP 36. He only threatened her and her children a few times. VRP 21, VRP 347-48. By contrast, every few days or once or twice a week Mr. Rader

threatened harm to Heather or her family. VRP 44, 48-49. The threats escalated to every day after Heather returned home from the hospital. VRP 449.

Ria Rader testified to incidents of abuse unrelated to any abuse Heather Rader testified to. For example, Mr. Rader punched Ria in the arm in the summer of 2003, leaving a very large bruise. VRP 19. One time he threw her into his car when she was trying to leave and left bruises on her arms. VRP 20. Similarly, Heather testified to abuse Ria did not experience, such as being kicked in the face and set on fire. VRP 433-36, 447-48.

The State argued that Mr. Rader's use of the word "evil" with both Heather and Ria showed a common scheme. But the contexts of his use of that word were completely different. Mr. Rader told Ria women were evil, useless and worthless. VRP 24. By contrast, he told Heather she was evil and he had a bullet he was going to put in her head. VRP 426. Later that night, he told her she was evil and had to die before squirting lighter fluid on her. VRP 433.

That Ria also testified to some similar types of abuse did not create a substantial similarity between the prior and charged acts. The facts that Mr. Rader verbally abused both women, told both of them they could not leave, and physically prevented them from leaving him are all hallmarks of a domestic abuser, not indicators that Mr. Rader masterminded a common scheme or plan to

enable him to commit crimes against two women. The primary similarity in these acts is they were elements of crimes committed by Mr. Rader, an improper similarity:

Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves. Wigmore calls this the “abnormal factor” that ties the acts together. WIGMORE, § 302.

State v. Wade, 98 Wn. App. 328, 335, 989 P.2d 576 (1999) (holding fact that defendant sold drugs in the past could not be used to establish his intent to sell drugs in the charged offense). Without more in common than one perpetrator committing similar crimes against different people, no common scheme or plan was established.

Ria Rader testified that twice Mr. Rader grabbed her by her hair and her head hit the pavement. VRP 20-21. Heather testified Mr. Rader also grabbed her by the back of the hair. However, they were indoors. Mr. Rader hit her head on the kitchen counter, and partly threw her/she partly fell to the floor, bruising her forehead. VRP 429-30, 432-33. Mr. Rader also pushed both women. VRP 20, VRP 42-43. He verbally demeaned both women. VRP 21, 41. However, all these facts show is one man who sometimes abused two different spouses in somewhat

similar ways. *See* Wade, 98 Wn. App. 328, 336. Thus, the State failed to prove the substantial similarity required to establish a common scheme or plan.

Significantly, counsel found no common scheme or plan cases and the State cited none below permitting the State to submit evidence about a defendant's prior instances of domestic abuse against someone other than the alleged victim in the charged crime. Instead, the common scheme or plan cases generally arise in the context of sexual abuse or child sexual abuse. To extrapolate such cases to the instant situation would be unwarranted because sexual abuse and child sexual abuse cases present unique circumstances. "Prior similar acts of sexual abuse are generally very probative of a common scheme or plan, and the need for such proof is unusually great in child sex abuse cases." State v. Kennealy, 151 Wn. App. 861, 890, 214 P.3d 200 (2009) (internal quotation marks omitted); *accord* DeVincentis, 150 Wn.2d at 24-25 (a "common sense" approach for the use of prior bad acts to show a plan is especially important "in cases of sexual crimes, because the doing of the act is often difficult to prove"); State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007) ("Where a defendant is charged with child rape or child molestation, the existence of 'a design to fulfill sexual compulsions evidenced by a pattern of past behavior' is probative of the defendant's guilt"), *quoting*, DeVincentis, 150 Wn.2d at 17-18; State v. Krause,

82 Wn. App. 688, 696, 919 P.2d 123 (1996) (holding testimony regarding prior acts of sexual contact with minor boys admissible when the acts showed common plan whereby defendant interjected himself into situations with adults with small children, gained the children's affections, and isolated them before molesting them); *see also* RCW 10.58.090 (making admissible in sex offense cases evidence of the defendant's commission of another sex offense). Accordingly, these cases have limited persuasive value in the instant context.

For all these reasons, the trial court erred in determining a common scheme or plan existed.

B. Even if a Common Scheme or Plan Existed, It Was Not Relevant to Proving Elements of the Charged Crimes

In addition, even if a common plan or scheme existed, it did not prove the elements of the charged crime. DeVincentis, 150 Wn2d 11, 17. When prior bad acts are admitted under a common plan theory, it is the existence of a common plan that must be relevant to proving elements of the charged crime, not merely the fact of the prior acts themselves. DeVincentis, 150 Wn.2d 11, 17-18 (“the existence of a design . . . evidenced by a pattern of past behavior is probative”). Otherwise, the State to proves the charged crime by propensity evidence alone:

For example, the State cannot show a defendant's motive to commit rape by introducing evidence that he assaulted a different

woman years earlier because it is both irrelevant to the defendant's motive for committing rape and unfairly prejudicial.

State v. Fuller, ___ Wn. App. ___, 282 P.3d 126, 143 (2012) (holding inadmissible defendant's prior plan to rob victim when charge was felony murder), *citing*, State v. Saltarelli, 98 Wn.2d 358, 365, 655 P.2d 697 (1982).

In this case, the court held Ria Rader's testimony established Heather's reasonable fear and Mr. Rader's threat to kill regarding the felony harassment charge, Mr. Rader's use of physical force and interference with liberty in the unlawful imprisonment charge, his assault of Heather related to the assault charges and elements of the witness tampering charge. VRP 93-94; CP 27. As an initial matter, Mr. Rader's abuse of Ria Rader, a woman Heather had never met, could do nothing to establish Heather's fear of Mr. Rader. Thus, the court erred in this holding. *Cf.* State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000) (evidence victim knew of defendant's earlier assaults against fellow inmates admissible to show victim's reasonable fear).

Next, rather than using the common plan to prove the charged crimes, the court impermissibly allowed the State to use the prior bad acts themselves to prove the crimes. The court allowed Ria's testimony of prior acts to prove Mr. Rader's threat to kill Heather, his use of physical force against Heather, his interference with Heather's liberty and his assaults on Heather. VRP 93-94. But

none of these elements is capable of being proven through Ria's testimony except through unlawful propensity evidence. Indeed, Mr. Rader's alleged threat to kill Ria or her daughters, his use of physical force against her and his interference with her liberty establishes nothing more than a criminal-type of character, the character of a spousal abuser. "Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith." Wade, 98 Wn. App. 328, 334.

For these reasons, the trial court erred in holding the prior bad acts testimony admissible to prove elements of the charged crimes.

C. The Probative Value of Ria Rader's Testimony Did Not Outweigh the Risk of Unfair Prejudice

Further, the probative value of Ria Rader's testimony did not outweigh the risk of unfair prejudice. *See* ER 403. When dealing with prior acts evidence, "substantial probative value" is required to outweigh the "inherent prejudice of evidence of prior bad acts." State v. Sexsmith, 138 Wn. App. 497, 505-06, 157 P.3d 901 (2007). Generally speaking, prior acts evidence is highly probative if there is "very little proof" the charged crime occurred. *Id.* at 506.

In this case, Ria Rader's testimony had little probative value for two reasons. First, the State had considerable proof of the charged crimes. Heather articulately testified regarding Mr. Rader's actions in the charged crimes. Her

testimony was, at least in part, corroborated by both the medical evidence and Mr. Rader's own statements in his jail call to her. Second, Ria's testimony involved solely her own experiences with Mr. Rader and did not prove – except through unlawful propensity evidence – how Mr. Rader treated Heather.

In addition, Ria Rader's testimony was highly prejudicial because it tended to establish Mr. Rader as a person who generally verbally and physically abuses his spouse. *See State v. Stanton*, 68 Wn. App. 855, 863, 845 P.2d 1365 (1993) (holding prejudicial effect of prior acts evidence outweighed prejudicial value when it showed defendant generally a deadbeat who made promises he did not keep). Because the probative value of the evidence was so slight, the real danger of unfair prejudice substantially outweighed the testimony's probative value.

For these reasons, the trial court erred in holding the probative value of Ria Rader's testimony outweighed the risk of unfair prejudice.

D. The Error Was Not Harmless

Finally, admission of Ria Rader's testimony harmed Mr. Rader. An erroneous ruling is not reversible error unless the court determines that, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Wilson*, 144 Wn. App. 166, 178, 181 P.3d 887 (2008), *quoting*, *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951

(1986). Improper admission of evidence constitutes harmless error if the evidence is of minor significance when compared with the evidence as a whole. Wilson, 144 Wn. App. 166, 178, *quoting*, State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

In Wilson, Division Three found harm when the trial court admitted highly prejudicial prior acts evidence that included evidence of prior assaults between the defendant and the victim, the defendant's prior arrest, and the defendant's statement that she planned to get even with the victim. Wilson, 144 Wn. App. at 177-78. By contrast, this Court found no harm in admitting prior acts evidence when the victim testified to all of the elements of the offense, her testimony was consistent with her statements to the police and the treating physician, and her injuries corroborated her story. State v. Thach, 126 Wn. App. 297, 311, 106 P.3d 782 (2005).

These cases compel the conclusion reversible error occurred here. Here, as was similarly true in Wilson, Ria's testimony regarding Mr. Rader's repeated verbal and physical abuse of her was highly prejudicial. Moreover, unlike in Thach, in this case, Heather's testimony and prior statements were inconsistent, thus creating the likelihood the jury would have acquitted on the charges without the impermissible testimony. Heather repeatedly told the first responders, police

and medical personal she started the fire, before she changed her story to blame Mr. Rader. Indeed, the jury acquitted in this case on three charges even with the impermissible testimony, indicating the State's evidence was less than solid. For these reason, the error harmed Mr. Rader and this Court should reverse his convictions.

POINT II: The Trial Court Abused Its Discretion in Admitting Expert Testimony on "The General Dynamics of Domestic Violence," Over the Defendant's Relevance Objection, When Much of the Evidence Admitted under this Broad Ruling Was Irrelevant

The trial court improperly allowed the State to provide the unrestricted testimony of Peg Cain, the expert on domestic violence, when much of her testimony was not relevant. Expert testimony is admissible if a) it is generally accepted in the relevant scientific community, b) the expert qualifies as an expert, and c) the expert's testimony would be helpful to the trier of fact. ER 702; State v. Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996). To be admitted, the expert testimony must also be relevant. ER 402 ("Evidence which is not relevant is not admissible."). This Court reviews the admissibility of evidence for abuse of discretion. State v. Grier, 168 Wn. App. 635, 644, 278 P.3d 225 (2012). In this case, the trial court abused its discretion in issuing a broad order that

impermissibly allowed admission of both relevant and irrelevant evidence, prejudicing Mr. Rader and requiring reversal.³

Counsel found no cases in which a trial court allowed expert testimony on a topic as broad as “the general dynamics of domestic violence.” When the Supreme Court found admission of an expert’s opinion on domestic abuse useful to the trier of fact in State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988), the trial court had admitted the testimony for a limited purpose: to illuminate the victim’s state of mind, specifically not to address the defendant’s actions. *Id.* at 272. In Ciskie, the Court relied on a Ninth Circuit case that had similarly admitted such testimony for the limited purpose of understanding the mental state of victims of battering and sexual abuse. *Id.* at 274, *citing*, United States v. Winters, 729 F.2d 602 (9th Cir. 1984). Moreover, in both Ciskie and Winters, the testifying experts had apparently examined the victims and diagnosed PTSD. Ciskie, 110 Wn.2d at 279; Winters, 729 F.2d at 605.

By contrast, in this case, unlike in Ciskie and Winters, the expert testimony was limited to generalities because the expert had never spoken to

3. Mr. Rader objected to the expert testimony on the grounds that it would be irrelevant and based solely on hypothetical questions. CP 16, VRP 82. That he did not continue to object during her testimony does not result in a waiver of his objection. State v. Tanner, 54 Wn.2d 535, 537, 341 P.2d 869 (1959) (holding spousal privilege not waived by failure to object to testimony when objection raised in pretrial motion).

Heather Rader. Moreover, although the ostensible purpose of the expert testimony was to explain why Heather Rader did not immediately report the incidents resulting in the charged crimes, the court broadly gave the State permission to introduce evidence about “the general dynamics of domestic violence.” CP 29. This order allowed the State to question Ms. Cain about any aspect of domestic violence, whether relevant or not.

In particular, the order allowed the State to question Ms. Cain extensively about the nature of perpetrators, a matter not relevant to either Ms. Rader’s state of mind or the elements of the charged crimes. Cain explained that perpetrators learn domestic violence as a coping skill around issues of power and control. VRP 368. They come from all demographics. VRP 370. Perpetrators usually have issues around feelings of powerlessness originating in abusive childhoods and believe if they have more power they will feel better. *Id.* Perpetrators are filled with denial and generally blame their behavior on their partners. VRP 371.

Cain also testified as to how perpetrators act: Perpetrators control such details as where their partners go and with whom they associate. VRP 371. They usually have a need to isolate their partners, starting with reducing contact with friends and outside activities and eventually isolating the partner from family members. VRP 370-71. None of the evidence regarding the mental state or

behavior of perpetrators was relevant to either why Heather did not immediately report her allegations or to any of the elements of the charged crimes.

Also irrelevant was Cain's testimony that victims may suffer from post traumatic stress disorder, which may manifest as a heightened alertness to their safety, constant surveillance, and a fear of causing a problem. VRP 374-75. Similarly, it was irrelevant to tell the jury that victims only "feel safe is when they know [the perpetrator] is in jail, because they spend a lot of time looking over their shoulders." VRP 374. Finally, when the issue was Ms. Rader's failure to immediately report the incidents, it was irrelevant to tell the jury that typically a woman leaves an abuser seven times before staying away and for others it may take 14 times, "if they're not dead." VRP 385.

The court's admission of this irrelevant evidence harmed Mr. Rader and requires reversal because the expert's testimony was highly prejudicial. In determining whether to reverse a conviction based on nonconstitutional error, courts weigh the admissible evidence of guilt against the prejudice caused by the inadmissible evidence. If the inadmissible evidence was of minor significance in reference to the overwhelming evidence as a whole, courts will not reverse. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

In this case, the inadmissible evidence was highly prejudicial, likely affecting the outcome of the case and requiring reversal. Through Cain's testimony, the State was able to portray Mr. Rader as a perpetrator of domestic violence due to his nature and upbringing. The evidence created the inference that, as a perpetrator, Mr. Rader would naturally deny his guilt and blame his wife for his actions. Further, he would control his wife and isolate her from friends and family. Moreover, Heather Rader, the victim damaged by Mr. Rader's abuse, could only feel safe if Mr. Rader were in prison. In fact, she was lucky to escape with her life. Before Heather ever took the stand, the charged crimes were contextualized as part of Mr. Rader's cycle of domestic violence. Under these circumstances, the irrelevant evidence was highly prejudicial and this Court should reverse Mr. Rader convictions.

POINT III: The Trial Court Erred in Admitting the Statements Mr. Rader Made to a Treating Physician's Assistant, Prejudicing Mr. Rader and Requiring Reversal of the Arson Conviction

The trial court erred in its interpretation of the balancing test determining whether the patient-physician privilege should be abrogated. A court reviews the interpretation of an evidentiary rule de novo. *See DeVinentis*, 150 Wn.2d 11, 17.

The civil patient-physician privilege statute, RCW 5.60.060(4), applies to criminal cases "so far as practicable" and gives the patient the right to claim the

privilege. RCW 10.58.010; State v. Gibson, 3 Wn. App. 596, 598, 476 P.2d 727 (1970) (holding statement made to jail doctor in presence of guard privileged). As a statute in derogation of common law, RCW 5.60.060(4) is to be construed strictly and limited to its purposes. Carson v. Fine, 123 Wn.2d 206, 213, 867 P.2d 610 (1994) (in civil matter, holding plaintiff in malpractice case waived privilege). The statute serves two purposes: First, it surrounds medical care with a “cloak of confidentiality” that promotes proper treatment by facilitating full disclosure of information. *Id.* (citation omitted). Next, “it protect[s] the patient from embarrassment or scandal which may result from revelation of intimate details of medical treatment.” *Id.*

Because the privilege generally applies in criminal cases, for the privilege to be abrogated, some unusual circumstance must take the case out of the mine run of cases. *See, e.g., State v. Boehme*, 71 Wn.2d 621, 635-37, 430 P.2d 527 (1967) (holding defendant could not claim privilege for wife/victim and victim could not claim privilege solely to shield her husband from prosecution). No such unusual circumstance exists here, although a constellation of unusual circumstances resulted in Division One abrogating the privilege in 1997.

In State v. Smith, Division One found the purposes of the privilege outweighed by the public interest when the defendant, who admitted drinking,

claimed the privilege with regard to a blood sample taken shortly after he drove his car into a utility pole, paralyzing a passenger of his car. State v. Smith, 84 Wn. App. 813, 929 P.2d 1191 (1997). Smith, however, is plainly distinguishable.

In Smith, the defendant was taken to a hospital after the crash, where a blood sample was taken. *Id.* at 815. He was later arrested and charged with vehicular assault. The trial court excluded admission of the defendant's blood sample and medical records on the grounds that they were protected by the patient-physician privilege. Smith, 84 Wn. App. 813, 816. The alcohol content of the defendant's blood was a major issue in the trial. Without the blood sample, which could have proven his blood alcohol level, the State could not prove the charge and the trial ended in a mistrial. *Id.*

As an initial matter, the dependence of the case on the blood sample was the first unusual circumstance in Smith. In the instant case, as in most cases, the prosecution's case did not largely rest on a single privileged communication. Here, unlike in Smith, Mr. Rader's statement in the PA's report that he started the fire that injured him while drunk was, at most, a minor part of the State's case. The State sought its introduction to rebut Mr. Rader's general denial of the charges. CP 162. But the State had other means to rebut the denial. Two other witnesses plus Mr. Rader's own statements contradicted his general denial.

Deputy Beall testified Mr. Rader told him he was smoking by the back door and the couch caught fire. VRP 220, 245. Mr. Rader's supervising officer testified Mr. Rader told him after Ms. Rader spilled some lighter fluid, "[w]hen he went to go light the cigarette . . . she had caught on fire." VRP 275. Moreover, Mr. Rader told Heather, when he called her from the jail that "[i]t happened." *See* VRP 568. Thus, the State also had unprivileged testimony contradicting Mr. Rader's denial. For these reasons, the PA's testimony, unlike the disputed blood sample in Smith, had relatively little additional probative value.

Next, the Smith court's balancing of the purposes of the privilege against the public interest was also unusual for several reasons. First, Division One noted the implied consent statute relevant in that case evidenced the "legislative determination that the public has a significant interest in the full revelation of facts surrounding the alcohol consumption of those who drive." Smith, 84 Wn. App. 813, 821. By contrast, that statute does not apply here and this case, like most other criminal cases, lacks a clear expression of legislative intent of utmost disclosure. Here, the court must simply balance the public interest in a full judicial investigation of the charges against the purposes of the privilege. *See* Boehme, 71 Wn.2d 621, 637, 430 P.2d 527 (1967); State v. Ross, 89 Wn. App. 302, 947 P.2d 1290 (1997) (in holding no privilege in communication to paramedic, court noted

“the public interest in full disclosure of the facts”). In this case, as in most criminal cases, that balancing does not compel disclosure.

Another unusual aspect of the balancing test in Smith was that the disputed blood sample would normally be taken while the defendant was under arrest and that the defendant would have no right to refuse to have the blood tested or to keep the results confidential. Smith, 84 Wn. App. 813, 821. Thus, the court held the first purpose of the privilege, encouraging full disclosure for proper medical treatment, would not be promoted in drunk driver situations under normal circumstances. *Id.* By contrast, in this case, Mr. Rader’s privileged communications would not normally have been made while under arrest, nor would they normally be subject to full disclosure. Mr. Rader spoke to a treating PA because the burns on his foot prevented him from performing his duties. Thus, this circumstance also distinguishes the instant case from Smith.

The final, and perhaps most striking, unusual circumstance in Smith was what the State sought to be disclosed: a blood sample, not a communication. The Smith court held that because a blood test does not constitute an undue imposition on an individual's personal privacy, the benefits of applying the privilege to the blood sample were minimal. 84 Wn. App. at 821. Of course, an communication made for the purpose of treatment, not a blood sample, is at issue here.

In this case, one without the unusual circumstances present in Smith, the trial court erred in applying the balancing test. It balanced the interest in full disclosure against only the second purpose of the privilege: the embarrassment Mr. Rader might suffer as a result of the disclosure. VRP 133. But that interest will generally be outweighed in a criminal trial when the defendant claims the privilege. *See Smith*, 84 Wn. App. 813, 821 (noting embarrassment and scandal likely due largely to fact of criminal charge). Here, the first purpose of the privilege, facilitating full disclosure of information in treatment, is more relevant. Yet the trial court ignored this purpose entirely. *See* VRP 133. When the interests of a full judicial investigation are balanced against the need to facilitate full disclosure when a patient is treated by medical personnel, absent any unusual circumstances such as those present in Smith, the privilege must outweigh the public interest. *See, e.g., State v. Godsey*, 131 Wn. App. 278, 286, 127 P.3d 11 (2006) (reversing conviction for possession of drug paraphernalia when admission of defendant's drug use confessions made in presence of law enforcement violated physician-patient confidentiality under RCW 5.60.060(4)); Gibson, 3 Wn. App. 596, 598 (reversing conviction for assault when admission of defendant's statement to doctor in presence of guard enforcement violated physician-patient confidentiality under RCW 5.60.060(4)).

For all these reasons, the trial court erred in holding the public interest in disclosure overrode the purpose of the privilege.⁴

In addition, the trial court's error harmed Mr. Rader because, while the State had other evidence to rebut Mr. Rader's denial, none was quite so unequivocal as the PA's testimony. She stated Mr. Rader told her, categorically, that he started the fire while drunk. VRP 262. On the other hand, Mr. Rader told his superior officer he started the fire when he lit a cigarette, but he also said Heather was involved in the incident. Similarly, the statement to Deputy Beall explains the couch, but not the burns Heather suffered. Finally, Mr. Rader's statement to Heather that "[i]t happened" was nonspecific and could have referred to any of the incidents. Thus, the PA's testimony was particularly damaging. Moreover, the jury was likely to believe Mr. Rader spoke freely and honestly to

4. The cases cited in the State's trial brief do not alter this conclusion. *See, e.g., Department of Social and Health Services v. Latta*, 92 Wn.2d 812, 601 P.2d 520 (1979) (holding patient-physician privilege inapplicable to DSHS compliance audits of medical records of Medicaid recipient); *State ex rel. Haugland v. Smythe*, 25 Wn.2d 161, 169 P.2d 706 (1946) (holding welfare department required to produce juvenile's records); *State v. Harris*, 51 Wn. App. 807, 755 P.2d 825 (1988) (declining to create "a broad mental health counselor/client privilege" and holding, in any event, defendant did not have an expectation of confidentiality); *State v. Brewton*, 49 Wn. App. 589, 744 P.2d 646 (1987) (holding assertion of diminished capacity defense waived privilege just as insanity defense did); *Cook v. King*, 9 Wn. App. 50, 510 P.2d 659 (1973) (discussing RCW 5.60.060(5), which grants only a conditional privilege).

the PA who was treating his second degree burns. Thus, the statement to the PA was more incriminating and prejudicial than any of the other statements. When the primary issue was the credibility of Ms. Rader's testimony as compared to the credibility of Mr. Rader's general denial of the allegations, the admission of Mr. Rader's apparent confession to his PA likely influenced the outcome of the trial and requires reversal of the arson conviction.

POINT IV: If None of the Errors Individually Requires Reversal, this Court Should Reverse for Cumulative Error

If the Court does not find prejudice in any of the individual errors in admission of evidence, it should find cumulative error requires reversal. The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal. In re Detention of Coe, No. 85965–5, 2012 WL 4458411 *17 (September 27, 2012), *citing*, State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, Ria Rader's descriptions of Mr. Rader's abuse during their marriage and the testimony of the domestic violence expert explaining the psychological underpinnings of perpetrators and the psychic damage wrought on victims allowed the State to portray Mr. Rader as a inveterate wife beater caught up in a cycle of violence before the victim in this case ever took the stand. That unfairly

prejudicial testimony, combined with the admission of Mr. Rader's privileged statements to the PA, deprived him of a fair trial and require reversal.

POINT V: The State Failed to Prove Either the Arson or the Unlawful Imprisonment "Occurred Within Sight or Sound of the Victim's . . . Minor Children"

The evidence at trial was insufficient as a matter of law to prove the aggravating factor found by the jury and this Court should vacate and remand Mr. Rader's sentence. "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt." RCW 9.94A.537(3); *accord* State v. Zigan, 166 Wn. App. 597, 270 P.3d 625 (2012); CP 34-72 (Jury Instruction No. 32). This Court uses the same standard of review for the sufficiency of the evidence of an aggravating factor as it does for the sufficiency of the elements of a crime. State v. Yarbrough, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009).

A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence

must be drawn in favor of the State and interpreted most strongly against the defendant.” Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201.

In this case, the State failed to prove the arson or the unlawful imprisonment conviction “occurred within sight or sound of the victim’s or the offender’s minor children under the age of eighteen years.” RCW 9A.535(2)(h)(ii); CP 34-72 (Jury Instruction No. 33). First, the unlawful imprisonment did not occur within sight or sound of Ms. Rader’s daughter. Unlawful imprisonment occurs when a person knowingly and unlawfully restrains another person. RCW 9A.40.040; CP 34-72 (Jury Instruction No. 22). The events on which this conviction was based occurred when Ms. Rader was in the kitchen getting her purse prior to trying to leave before the fire. VRP 551-52.

This crime occurred far from where Heather’s daughter could hear or see it. When Mr. Rader prevented Ms. Rader from leaving, they were both downstairs in the kitchen. VRP 428-29 (Heather went to get her purse from the kitchen, Mr. Rader walked over to her). At this time, Heather’s daughter was upstairs, “kind of awake” in her bedroom. VRP 432, 462. Mr. Rader hit Ms. Rader’s head on the kitchen counter and she fell or was thrown to the floor. VRP 430, 433. Clearly, this crime did not occur within the daughter’s sight.

Moreover, there was no evidence the daughter heard this crime. The daughter did not testify. *See* VRP. There was no evidence the crime made any noise at all, particularly noise that would be audible to a semi-awake child in an upstairs bedroom. Indeed, the daughter's door may have been closed. *See* VRP 463 (Ms. Rader testified that later, her daughter "poked her head out, but I told her to stay in her room"). Without any evidence the daughter saw or heard the crime, the State failed to prove the aggravating factor as to this conviction and this Court should vacate and remand Mr. Rader's sentence.

Next, the arson also did not occur within sight or sound of Ms. Rader's daughter. Arson in the first degree occurs when a person "knowingly and maliciously: (a) Causes a fire or explosion which is manifestly dangerous to any human life." RCW 9A.48.020(1); CP 34-72 (Jury Instruction No. 17). Mr. Rader committed this crime when he sprayed lighter fluid on Ms. Rader's legs and tossed a lit match on her. VRP 435. As with the unlawful imprisonment, this crime was committed out of the sight of Heather's daughter and there was no evidence she heard it occur.

While Heather began screaming and running around once her legs caught fire, VRP 436, the crime itself was not committed within her daughter's hearing. Moreover, although the daughter clearly was afraid when Heather first saw her,

VRP 463, the State failed to prove it was witnessing either the witness tampering or the arson that scared her. She could just as easily have been terrified at the sight of her mother, who had large blisters up and down her legs and was on the phone to 911. VRP 462-63. Further, the 911 call did not take place until both crimes were completed, after Ms. Rader soaked in a cold tub to try to alleviate the pain. VRP 437-38. Thus, that the daughter's voice could be heard on the 911 call, VRP 649, does nothing to establish either crime occurred within her sight or sound.

In sum, all the State proved was the crimes were committed on the downstairs floor of a house while the victim's daughter was upstairs. On the evidence before the court, the State failed to establish the crimes were committed within the daughter's sight or sound as required by RCW 9.94A.535(2)(h)(ii). When this was the only ground for nearly doubling Mr. Rader's sentence for arson and nearly tripling the sentence for unlawful imprisonment, this Court should vacate and remand Mr. Rader's sentence. *Cf. State v. Nysta*, 168 Wn. App. 30, 54, 275 P.3d 1162 (2012) (when exceptional sentence was based on both jury finding and two additional grounds, any of which would have supported sentence according to trial court, remand not required if jury finding deemed problematic).

V. CONCLUSION

For all of these reasons, Duane M. Rader respectfully requests this Court to reverse his convictions or, in the alternative, to vacate his sentence and remand for resentencing.

Dated this 4th day of October 2012.

Respectfully submitted,

/s/ Carol Elewski

Carol Elewski, WSBA # 33647

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 4th day of October 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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and, by U.S. Mail, on:

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/s/ Carol Elewski
Carol Elewski

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